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8                   UNITED STATES DISTRICT COURT  
9                   WESTERN DISTRICT OF WASHINGTON  
10                  AT TACOMA

11                  CHRISTOPHER MILLER,

12                  Plaintiff,

13                  v.

14                  MARGARET GILBERT et al.,

15                  Defendants.

16                  CASE NO. 3:16-CV-05891-BHS-JRC

17                  REPORT AND RECOMMENDATION

18                  NOTED FOR: OCTOBER 13, 2017

19                  Before the Court is plaintiff's voluntary motion to dismiss defendant McCarty without  
20 prejudice. Dkt. 47. Defendants have not filed any opposition to this motion. The undersigned  
21 therefore recommends that the motion be granted and that defendant McCarty be dismissed  
22 without prejudice.

23                   **BACKGROUND**

24                  This case was transferred to this Court from Grays Harbor Superior Court on October 21,  
25 2016. Dkt. 1. The Court granted plaintiff's motion to amend and accepted his first amended  
complaint on December 14, 2016 against Margaret Gilbert, Lt. McCarty, Daniel Van Ogle,

1 Wilbur, Martinez, Miller, S Hudson, Pat Doe #1, Pat Doe #2, and the Peerless Handcuff  
2 Company. Dkts. 13, 14. All defendants but defendant Peerless filed an answer on December 27,  
3 2017. Dkt. 17. Defendant Peerless filed an answer on February 13, 2017.

4 On June 30, 2017, the Court granted a motion to amend and accepted plaintiff's second  
5 amended complaint naming as defendants Pat Doe #1, Pat Doe #2, Margaret Gilbert, S. Hudson,  
6 Martinez, Miller, Peerless Handcuff Company, Daniel Van Ogle, Wilbur, Eric Mainio, and Cory  
7 Elis. All defendants except defendant Peerless filed an answer on July 12, 2017. Dkt. 37. All  
8 defendants except defendant Peerless also filed a motion for summary judgment as to the state  
9 defendants on July 27, 2017. Dkt. 38.

10 Petitioner filed this motion to voluntarily dismiss defendant McCarty on August 8, 2017.  
11 Dkt. 47. Defendant Peerless was subsequently dismissed by stipulation and order on August 30,  
12 2017. Dkts. 52, 54.

### 13 DISCUSSION

14 Rule 41 of the Federal Rules of Civil Procedure sets forth the circumstances under which  
15 an action may be dismissed. Plaintiff must seek leave of Court to dismiss this action because an  
16 answer and a motion for summary judgment have both been filed. *See* Dkts. 37, 38.

17 Here, plaintiff moves for dismissal of defendant McCarty (Dkt. 47) and defendants have  
18 not offered any opposition. Accordingly, the Court recommends that plaintiff's motion to dismiss  
19 defendant McCarty (Dkt. 47) be granted and that the Court dismiss this action against defendant  
20 McCarty without prejudice.

21 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil  
22 Procedure, the parties shall have fourteen (14) days from service of this Report and  
23 Recommendation to file written objections. See also Fed. R. Civ. P. 6. Failure to file objections

1 will result in a waiver of those objections for purposes of appeal. *Thomas v. Arn*, 474 U.S. 140  
2 (1985). Accommodating the time limit imposed by Rule 72(b), the clerk is directed to set the  
3 matter for consideration on **October 13, 2017** as noted in the caption.

4 Dated this 26th day of September, 2017.

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J. Richard Creatura  
United States Magistrate Judge

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